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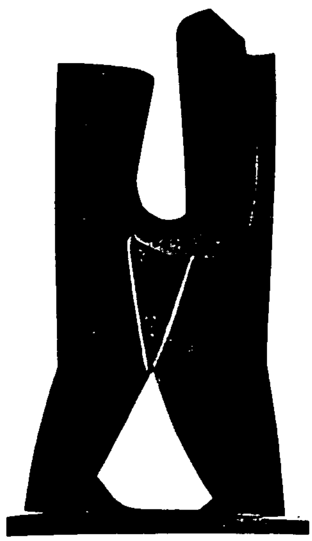

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The Limits of Antitrust

Frank H. Easterbrook*

The goal of antitrust is to perfect the operation of competitive markets. What does this mean? A "competitive market" is not necessarily the one with the most rivalry moment-to-moment. The auction in which atomistically small buyers and sellers continuously shout out bid and asked prices, the picture of "perfect competition" found in economic texts, is a hypothetical construct. Every market entails substantial cooperation over some domain in order to facilitate competition elsewhere. Every firm has webs of internal cooperation. Exxon entails far more coordination than the average cartel. Every joint venture, every partnership, indeed every contract creates cooperation among people who might otherwise be rivals. Markets themselves are organized. The Chicago Board of Trade, perhaps the closest of modern markets to the textbook ideal, has a sheaf of rules and cooperative arrangements that reduce the cost of competition.

The dichotomy between cooperation inside a "firm" and competition in a "market" is just a convenient shorthand for a far more complicated continuum. Antitrust law permits, even encourages, cooperation within a "firm," for such cooperation is the basis of economic productivity. But everything done within a firm could be done by market transactions as well. The degree of integration is variable, and some firms are integrated through many more stages of production than others. The firm itself is just a legal name for a complicated set of contractual arrangements among workers, managers, and contributors of capital. The firm expands to include more and more such contractual arrangements until, at the margin, the costs of controlling additional production internally equal the costs of coordinating production through market or "spot" transactions with "outsiders." The internal costs may include the difficulty of coordination, the difficulty of giving correct incentives to agents, and the loss of information that markets offer in the form of prices. The ways in which these costs compare with the costs of organizing and maintaining markets are not fixed. Thus, there is no "right" balance between inside and outside transactions. There is only an ever-shifting equilibrium, differing from firm to firm, product to product, and time to time, as the relative costs of internal and market operations change.

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If all economic arrangements entail extensive cooperation, how is an antitrust court to proceed? Unless the court knows the "right" balance between competition and cooperation in each market, it does not know in which direction to move. Are 10-year exclusive dealing contracts between oil companies and service stations too long? Too short? Just right? Does it matter whether there are two oil companies or twenty? 200 stations or 20,000? Is a Herfindahl-Hirschmann Index of concentration in titanium dioxide of 3000 too high? Too low? Just right? If the court tries to move the economy in the direction of the textbook model of atomistic auctions, it is sure to be wrong a great deal of the time. If the court tries to do anything else, it is at sea.

A fundamental difficulty facing the court is the incommensurability of the stakes. If the court errs by condemning a beneficial practice, the benefits may be lost for good. Any other firm that uses the condemned practice faces sanctions in the name of stare decisis, no matter the benefits. If the court errs by permitting a deleterious practice, though, the welfare loss decreases over time. Monopoly is self-destructive. Monopoly prices eventually attract entry. True, this long run may be a long time coming, with loss to society in the interim. The central purpose of antitrust is to speed up the arrival of the long run. But this should not obscure the point: judicial errors that tolerate baleful practices are self-correcting, while erroneous condemnations are not.

In most cases even a perfectly informed court will have trouble deciding what the optimal long-run structure of the industry is, because there is no "right" balance between cooperation and competition. The judge has no benchmark. Small wonder that the history of antitrust is filled with decisions that now seem blunders.

Enforcement of the rule against naked horizontal restraints appears to be beneficial. But suits against mergers more often than not have attacked combinations that increased efficiency, and the dissolution of mergers has led to higher prices in the product market. There are good theoretical reasons to believe that the costs of other enforcement efforts have exceeded the benefits. Indeed, from time to time the Supreme Court explicitly states that it is sacrificing economic efficiency to other goals. I do not think such sacrifices are appropriate in antitrust, but that is another debate. Whether courts *try* to trade efficiency against other goals is less important than whether they do.

Antitrust is costly. The judges act with imperfect information about the effects of the practices at stake. The costs of action and information are the limits of antitrust. I ask in this essay how we should respond to these limits.

I. Ignorance and Inhospitality in Antitrust

Donald Turner once described the "inhospitality tradition of antitrust." The tradition is that judges view each business practice with suspicion, always wondering how firms are using it to harm consumers. If the defendant cannot convince the judge that its practices are an essential feature of competition, the judge forbids their use.

Inhospitality is an old tradition. Adam Smith stated that businessmen could hardly begin to talk before their thoughts turned to restraint of trade. Jeremy Bentham and Oliver Wendell Holmes gave us a "bad man" vision of the law. George Stigler gave us a view of politics in which interest groups "purchase" legislation to suppress competition. Economists as well as judges are suspicious: "If an economist finds something . . . that he does not understand, he looks for a monopoly explanation. And as in this field we are very ignorant, the number of ununderstandable practices tends to be rather large, and the reliance on a monopoly explanation frequent."[1]

Yet all business arrangements entail some cooperation, if only the cooperation in delivering the product pursuant to a contract of sale. Cooperation is the source of monopoly, yet it is also the engine of efficiency. Firms organize some span of activities the better to compete with others. No surprise that antitrust enforcers and courts, charged with finding the anticompetitive cooperation in a maze of beneficial cooperation, should turn a suspicious eye on practices that seem to entail cooperation without competitive benefit.

The inhospitality tradition of antitrust has proved very costly. The costs were inevitable. Wisdom lags far behind the market. It is useful for many purposes to think of market behavior as random. Firms try dozens of practices. Most of them are flops, and the firms must try something else or disappear. Other practices offer something extra to consumers—they reduce costs or improve quality—and so they survive. In a competitive struggle the firms that use the best practices survive. Mistakes are buried.

Why do particular practices work? The firms that selected the practices may or may not know what is special about them. They can describe *what* they do, but the *why* is more difficult. Only someone with a very detailed knowledge of the market process, as well as the time and data needed for evaluation, would be able to answer that question. Sometimes no one can answer it.

Ignorance would be tolerable but for the fact that every successful competitive practice has victims. The more successful a new method of making and distributing a product, the more victims, the deeper the victims' injury. Joseph Schumpeter called competition a "gale of creative destruction." It is a never-ending process of weeding out the sluggish and the inefficient. Yet those who lose in the competitive struggle do not view the outcome as just. They are probably less knowledgeable than the average business executive about why they failed and others suc-

[1]Coase, *Industrial Organization: A Proposal for Research*, in 3 Policy Issues and Research Opportunities in Industrial Organization 59, 67 (V. Fuchs ed. 1972).

ceeded. (If they knew what went wrong, they might have improved.)

The gale of creative destruction produces victims before it produces economic theories and proof of what is beneficial. The antitrust laws invite these victims to take their grievances to court. They hire lawyers who know less about the businesses than the people they represent. As the case arrives in court, the judge sees a business practice that has caused a formerly successful business to fail or to be deprived of a profitable opportunity ("foreclosure").

The judge knows even less about the business than the lawyers. At first hearing, the failure or lost opportunity is bound to seem a reduction in competition. Fewer competitors remain, and fewness is the definition of monopoly (or at least oligopoly). The defendant is unlikely to have a good explanation for its success. The time is not ripe. When the defendant lacks a powerful explanation for its conduct, and the evidence points to "exclusion," a judge is likely to conclude: "Why *not* prohibit this practice? If it is anticompetitive, the prohibition will be beneficial. If it is not anticompetitive, the prohibition will be harmless; the defendant cannot tell me why the practice is essential to efficiency."

Reasoning of this sort has led to the condemnation—often under a per se rule—of horizontal agreements by the dozen as well as tie-ins, resale price maintenance, vertical territorial and customer restrictions, patent pools, block booking, and a host of other business practices. The Supreme Court once said that "[t]ying agreements serve hardly any purpose beyond the suppression of competition,"[2] a phrase it has applied to many other practices. But it is not true. Economists have developed procompetitive explanations for all of these practices, sometimes several explanations for each practice. Then, too, practices that were deleterious yesterday may yield benefits today, as the balance of advantage between contractual and market organization changes. By the time scholars understand why the practice succeeded, it is too late.

It is too late in the sense that years of efficient business practices have been lost. Too late in the sense that the Court may invoke stare decisis, and some member of Congress will call for the impeachment of the head of the Antitrust Division who takes the new learning seriously. Too late in the sense that most people are comfortable with the way things are and do not like change. Some are intellectually comfortable, others (those whose business would be threatened by the competition from the practice in question) are financially comfortable. The prohibitory rules create their own constituencies.

Too late, finally, in the sense that businesses abandon the justifications newly opened to them. Once a practice has been declared unlawful, a business is likely to defend a

[2]Standard Oil Co. v. United States, 337 U.S. 293, 305–06 (1949).

lawsuit by denying that it engaged in the practice. Rarely will it say: "Yes, we did that, and here is why it is economically beneficial that we did." Judges thus are deprived of opportunities to reconsider, with the light of knowledge, what they decided in ignorance. This was brought home forcefully in the *Monsanto* case, in which the Supreme Court declined the Solicitor General's invitation to reassess the per se rule against resale price maintenance. The Court observed that the defendant had not asked the district court to overrule the earlier Supreme Court cases, and thus the issue was foreclosed.

The practices that come before the courts today are more complex than "naked" tying or resale price maintenance, and the questions are more difficult. One recent case presented issues arising out of the "blanket license" issued by ASCAP and BMI, two performing rights societies, to those who play music. At one level, the blanket license is a raw price fixing agreement among almost all rivals in the market. At another level, the license is a cost-reducing device, allowing those who want music to get what they need without thousands of individual licensing transactions. The Supreme Court thought this sufficiently complex that it called for application of the Rule of Reason, which has hurled the lower courts into confusion.

Another case presented an agreement among physicians in Arizona. The physicians specified payments from insurance companies that they would accept in satisfaction of all obligations of the insureds. At one level this appears to be raw price fixing. At another level it is a signalling device by which the lower-price physicians can identify themselves and through which the physicians offer to share some of the insurance function, thus addressing a problem of moral hazard. This time the Court, dividing four to three, invoked the refrain that such agreements "serve hardly any purpose beyond the suppression of competition."

Last term the Court addressed a horizontal arrangement among the nation's colleges controlling the number of college football games available for broadcast. At one level this is a raw cartel; the NCAA has reduced the number of different contests shown on TV. At another the arrangement is like the cooperation inside any firm, in which the firm adopts the arrangements that make it most likely to succeed in competition with other firms. The NCAA is different from a firm only because integration is incomplete—cooperation on TV coexists with competition for talent and competition over the field. The NCAA portrayed its practices as elements in a struggle involving pro football, other sports, and entertainment in general; all were trying to attract viewers in a much larger advertising-entertainment business. The business as a whole required cooperation; Oklahoma did not want to destroy Nebraska and take Nebraska's business. The response of the lower courts: "Not persuaded," to which the Supreme Court added: "Not clearly erroneous."

"Not persuaded" is a common answer. Many times there are no satisfactory explanations. Their development comes too late. Other times the explanation is very difficult. Even when people know why business practices work —which is not very often—the explanation is hard to convey. It may entail some fancy theory or complicated econometrics. What can be conveyed in the academic seminar or the corporate board room is hard to articulate in a trial, when the judge and jury lack economic training and business expertise. The explanations may show how cooperative practices (or practices that exclude or harm rivals), which appear at first glance to be restrictive, will have longer-run benefits in competition. Such explanations meet hostile reactions.

The response "not persuaded" is natural when a judge is presented with a novel and difficult explanation of complex behavior. The benefits will not be precisely measurable. What evidence would suffice? The benefit of any arrangement is its improvement over the next-best method of obtaining the same objective. If it is hard to find what a given practice does, it is impossible to determine the difference in efficiency between a known practice and some hypothetical alternative.

Still, the existence of an alternative matters in the rhetorical contest. For example, vertical integration may achieve some of the benefits of restricted dealing. Extensive quality-control devices may be alternatives to tie-in sales. Everything has its alternatives. It is easy for a court to tell a party to use these alternatives. The alternatives may be more costly, but the defendant will not be able to show the amount of the difference. Because alternatives exist, the explanation for a particular practice may appear a too-clever effort to avoid the customary legal rules. The explanation may appear to be an attack on competition itself. It seeks to justify cooperation, does it not? It seeks to justify a market structure other than atomistic competition, does it not? Why should a judge be taken in? Any claim of long-run competitive gain invites judicial skepticism, and properly so. With skepticism comes demands for "better," perhaps unavailable, proof. Why should a judge accept a fancy, novel, untested theory when he has the less restrictive alternative, closer to the model of atomistic competition, ready to hand?

The inescapable question is, what happens when a judge is "not persuaded" by the explanation offered for a complex practice? The inhospitality tradition calls for the judge to condemn the practice. That is the wrong answer. A judge who is not persuaded by the explanation should not leap to the conclusion that whatever is poorly understood must be anticompetitive. The judge instead should strive to find a way to distinguish the competitive from the anticompetitive explanations of the practice. Each explanation predicts certain consequences—for example, most anticompetitive explanations predict lower output and higher prices. The judge should depend less on the lure of the model of atomistic competition and more on the making and testing of predictions. The judge should employ some presumptions and filters that will help to separate pro- and anti-competitive explanations. These filters would be the alternative to the inhospitality tradition, the solution to the limits of antitrust.

II. The Shrinking Per Se Rule and the Empty Rule of Reason

Antitrust has two modes of analysis: per se and Rule of Reason. The per se method responds to the high costs of information and litigation. Courts try to identify categories of practices so rarely beneficial that it makes sense to prohibit the whole category even with knowledge that this will condemn some beneficial instances. The costs of these unfortunate condemnations are less than the costs—both litigation and error costs—of making decisions case by case about competitive benefit.

As time goes by, fewer and fewer things seem appropriate for per se condemnation. We see competitive benefits in practices that once were thought uniformly pernicious. Ten years ago tying arrangements, boycotts, territorial allocations, and resale price maintenance were unlawful per se. Since then the Supreme Court has removed territorial allocations from the per se category, removed tying arrangements in all but name, stood by while lower courts quietly abrogated the per se treatment of boycotts, and invited reconsideration of the rule about resale price maintenance. It declined to apply the per se rule to a horizontal arrangement involving almost 100 percent of the composers of music, on the ground that this arrangement produced competitive benefits. In the process, the Court announced that the per se rule may be applied only after evaluation of the possible competitive consequences of an arrangement—thus undercutting the simplicity that is the principal justification for the rule.

These changes in the structure of antitrust analysis follow ineluctably from changes in our understanding of the economic consequences of the practices involved. If condemnation per se depends on a conclusion that almost all examples of some practice are deleterious, then discoveries about possible benefits lead to new legal rules. We cannot condemn so quickly anymore. What we do not condemn, we must study. The approved method of study is the Rule of Reason.

A court could try to conduct a full inquiry into the economic costs and benefits of a particular business practice, in the setting in which it has been used. But it is fantastic to suppose that judges and juries could make such an evaluation. The welfare implications of most forms of business conduct are beyond our ken. If we assembled twelve economists and gave them all the available data about a business practice, plus an unlimited computer budget, we would not get agreement about whether the practice promoted consumers' welfare or economic efficiency more broadly defined. They would discover some gaps in the data, some avenues requiring further exploration. Someone would invoke the principle of second best, claiming that monopoly could be a beneficial offset to distortions elsewhere. At least one of the economists would construct a new model showing how the practice *could* reduce efficiency if certain things (unknowable from the data) were present. A global inquiry invites no answer; it puts too many things in issue. To get an answer to a practical problem, we must start with some assumptions and fixed points of reference.

The economists might be able to reach agreement, though not on the basis of exhaustive empirical inquiry. They would resort to clues and shortcuts. They would use their economic knowledge of other markets to draw inferences about this one. Inference could be based on survival: If a practice has lasted a long time, despite competitive pressure, the practice is very likely beneficial. Otherwise the market position of the firm using the practice would have eroded under challenge from rivals. A firm collecting an overcharge ultimately loses sales to firms charging the competitive price. The evidence does not always permit such long run evaluation, though, and antitrust is designed to speed up the arrival of the long run (so that firms lose market power faster). The economists therefore might look at output changes in the short run. Does the firm using the challenged practice gain sales or lose them? An increase suggests efficiencies, a lower effective price per unit of quality delivered. Does the firm gain market share or lose it? Again an increase suggests net benefits. These tests require some difficult work—the economists need to employ regression analysis to hold other variables constant and isolate the effects of the challenged practice—but at least they offer a reliable rule of thumb.

If the economist has a way to approach new practices, a judge today has none. According to the Supreme Court, "[T]he inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition. . . . [T]he purpose of the analysis is to form a judgment about the competitive significance of the restraint."[3] How does a court tell whether the arrangement promotes or suppresses competition? It must

> consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be achieved are all relevant facts.[4]

[3]National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 691-92 (1978).

[4]Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

These formulations are empty. Judges and justices rightly protest that courts cannot make these judgments. "Courts are of limited utility in examining difficult economic problems. . . . [They are] ill-equipped and ill-suited for such decision-making [and cannot] analyze, interpret, and evaluate the myriad of competing interests and the endless data that would surely be brought to bear on such decisions."[5]

Of course judges cannot do what such open-ended formulas require. When everything is relevant, nothing is dispositive. Any one factor might or might not outweigh another, or all of the others, in the factfinder's contemplation. The formulation offers no help to businesses planning their conduct. Faced with a list of such imponderables, lawyers must engage in ceaseless discovery (they might find something bearing on a factor, and the factor might be dispositive). The higher the stakes, the more firms are willing to spend on discovery and litigation. The marginal week of discovery or trial just might mean saving a few millions or tens of millions of dollars. Litigation costs are the product of vague rules combined with high stakes, and nowhere is that combination more deadly than in antitrust litigation under the Rule of Reason.

Part of the difficulty in antitrust comes from ambiguity in what we mean by competition. Antitrust aims at preserving competition as an instrument for creating economic efficiency. Yet as I pointed out in the introduction, competition cannot be defined as the state of maximum rivalry, for that is a formula of disintegration. Today's cooperation creates both today's benefits and tomorrow's competition. A joint venture extinguishes some competition yet creates more against other economic units. The antitrust laws do not supply the time horizon for analysis, and there is no "right" answer. For example, it is now understood that the grant of patent rights, though creating a restriction of output during the patent's life, is important to give people incentives to invent. There is a tradeoff between optimal incentives *ex ante* and optimal use of existing knowledge, and intensive efforts to specify the "right" tradeoff have failed. The patent case is just a special application of the cooperation-competition balance. The search for *a* right answer is similarly doomed.

III. A Filter Approach to Antitrust Scrutiny

A. The Value of Presumptions

Courts should use the economists' way out. They should adopt some simple presumptions that structure antitrust inquiry. Strong presumptions would guide businesses in planning their affairs by making it possible for counsel to state that some things do not create risks of lia-

[5]United States v. Topco Assocs., 405 U.S. 596, 609, 612 (1972) (footnote omitted).

bility. They would reduce the costs of litigation by designating as dispositive particular topics capable of resolution.

If presumptions let some socially undesirable practices escape, the cost is bearable. The per se rule condemns whole categories of practices even though some practices in these categories are beneficial. The Court permits such overbreadth because all *rules* are imprecise. One cannot have the savings of decision by rule without accepting the costs of mistakes. We accept these mistakes because almost all of the practices covered by per se rules are anticompetitive, and an approach favoring case-by-case adjudication (to prevent condemnation of beneficial practices subsumed by the categories) would permit too many deleterious practices to escape condemnation. The same arguments lead to the conclusion that the Rule of Reason should be replaced by more substantial guides for decision.

In which direction should these rules err? For a number of reasons, errors on the side of excusing questionable practices are preferable. First, because most forms of cooperation are beneficial, excusing a particular practice about which we are ill-informed is unlikely to be harmful. True, the world of economic theory is full of "existence theorems"—proofs that under certain conditions ordinarily beneficial practices could have undesirable consequences. But we cannot live by existence theorems. The costs of searching for these undesirable examples are high. The costs of deterring beneficial conduct (a byproduct of any search for the undesirable examples) are high. When most examples of a category of conduct are competitive, the rules of litigation should be "stacked" so that they do not ensnare many of these practices just to make sure that the few anticompetitive ones are caught. When most examples of a practice are procompetitive or neutral, the rules should have the same structure (although the opposite slant) as those that apply when almost all examples are anticompetitive.

Second, the economic system corrects monopoly more readily than it corrects judicial errors. There is no automatic way to expunge mistaken decisions of the Supreme Court. A practice once condemned is likely to stay condemned, no matter its benefits. A monopolistic practice wrongly excused will eventually yield to competition, though, as the monopolist's higher prices attract rivalry.

Third, in many cases the costs of monopoly wrongly permitted are small, while the costs of competition wrongly condemned are large. A beneficial practice may reduce the costs of production for every unit of output; a monopolistic practice imposes loss only to the extent it leads to a reduction of output. Under common assumptions about the elasticities of supply and demand, even a small gain in productive efficiency may offset a substantial increase in price and the associated reduction in output. Other things equal, we should prefer the error of tolerating questionable conduct, which imposes losses over a part of the range of output, to the error of condemning beneficial conduct, which imposes losses over the whole range of output.

The legal system should be designed to minimize the total costs of (1) anticompetitive practices that escape condemnation; (2) competitive practices that are condemned or deterred; and (3) the system itself. The third is easiest to understand. Some practices, although anticompetitive, are not worth deterring. We do not hold three-week trials about parking tickets. And when we do seek to deter, we want to do so at the least cost. A shift to the use of presumptions addresses (3) directly, and a change in the content of the legal rules influences all three points.

Consideration (2) is especially important when most practices in the category are beneficial. A legal system that errs even a few percent of the time is likely to "catch" mostly desirable practices. If five percent of "tying" arrangements are deleterious, and the legal system errs ten percent of the time, it is apt to condemn twice as many beneficial arrangements as it catches anticompetitive ones. Better to change the presumption than to take this risk.

B. Some Promising Filters

The remainder of this essay describes and defends a series of presumptions. The first two would be employed in every case. The others would be used only if the defendant's practices offered potential economic benefits. All of these help to screen out cases in which the risk of loss to consumers and the economy is sufficiently small that there is no need of extended inquiry and significant risk that inquiry would lead to wrongful condemnation or to the deterrence of competitive activity as firms try to steer clear of the danger zone.

First, the plaintiff should be required to offer a logical demonstration that the firm or firms employing the arrangement possess market power. The demonstration need not entail the difficult market definition issues that so embroil cases. Second, the plaintiff should be required to demonstrate that the defendant's practices are capable of enriching the defendant by harming consumers. That is, the plaintiff must show that the defendant has an incentive to behave in an anticompetitive way and that antitrust sanctions are necessary to correct the defendant's incentives.

If these two inquiries suggest that the firms have an ability and incentive to behave in an anticompetitive way, a court should inquire whether the restraint is "naked." If the arrangement in question exists by itself—for example, if a group of firms agree on price but do not integrate any of their productive facilities—then it should be held unlawful. This is the function of the per se rule against cartels. The available evidence suggests that the application of this rule is beneficial to the economy, and so does the available economic theory. Cartels reduce output and produce nothing in return.

The question whether a restraint is "naked" requires some knowledge of its effects. The *Broadcast Music* inquiry plays a vital role here. The court appropriately attempts to discern whether a practice has potential competitive benefits, whether it can increase economic efficiency. Only if an agreement passes this potential-benefit filter would a court move on to the other inquiries.

The next question (the third filter) should be whether firms in the industry use different methods of production and distribution. If they do, then competition among these methods should be adequate assurance of benefit. If firms use similar arrangements, the court (fourth) should ask whether the evidence is consistent with a reduction in output. This entails (a) looking at changes in output shortly after a practice was adopted, and (b) looking at whether a practice has survived without substantial adverse effect on the defendants' market share. The fifth and final filter uses the identity of the plaintiff to infer something about the consequences of defendants' conduct. When a business rival brings suit, it is often safe to infer that the arrangement is beneficial to consumers.

Only when a potentially efficient business practice passes all five filters should a court undertake the heroic efforts required by today's Rule of Reason. The use of the filters will cut the inquiry short in most cases, saving substantially in litigation costs and uncertainties. It will structure the proceedings in the rest, leading courts to focus on the most important issues.

Existing rules, unlike this proposal, ask the per se question first. But in recent years the per se inquiry has required more and more economic exposition. There is no longer any real "shortcut" to condemnation. A defendant may show that a practice is beneficial in fact and therefore does not have the attributes that call for per se condemnation. Under *NCAA* the defendant may offer an economic justification even of a "naked" restraint. The defendant's opportunity to show benefits entails its obligation to assess competitive consequences, to which presumptions (1) and (2) direct attention.

There is still a category of per se cases in which no justification is allowed, but the costs of finding examples of this category have increased as courts have tried to refine the boundaries of the per se class. It seems better to start the inquiry with questions about power and incentives than with questions that are essentially definitional. At the same time, there is little to be lost. The value of a *real* per se approach—that is, condemnation without offering the defendant any chance to explain or justify its conduct—has fallen steadily since 1890. Reductions in transportation costs have enlarged the size of markets, so that it is no longer possible for a few firms to monopolize very many markets no matter how hard they try. The creation of world markets in many goods makes it difficult even for all firms in the United States to obtain monopoly profits. Most modern studies show that even the most concentrated industries behave competitively. The increasing power of competition, as well as the suspicion that cooperation may be beneficial in ways we do not understand or cannot explain, counsel restraint in condemning practices without at least a little inquiry into market power and incentives. I turn, then, to the five filters.

1. Market Power. The first filter is market power. A court should look at the practices alleged by the plaintiff and ask whether the defendant or defendants have market power. If the complaint attacks the practices of a single firm, the court should look at that firm's power; if the plaintiff challenges the cooperative practices of many firms, the court should ask whether the defendants have power if they act together as alleged.

Market power is the ability to raise price significantly without losing so many sales that the increase is unprofitable. Most firms have a little power, because their products are not perfectly interchangeable with the goods of others. But few firms have substantial power over price. Firms that lack power cannot injure competition no matter how hard they try. They may injure a few consumers, or a few rivals, or themselves (see 2 below) by selecting "anticompetitive" tactics. When the firms lack market power, though, they cannot persist in deleterious practices. Rival firms will offer the consumers better deals. Rivals' better offers will stamp out bad practices faster than the judicial process can. For these and other reasons many lower courts have held that proof of market power is an indispensable first step in any case under the Rule of Reason. The Supreme Court has established a market power hurdle in tying cases, despite the nominally per se character of the tying offense, on the same ground offered here: if the defendant lacks market power, other firms can offer the customer a better deal, and there is no need for judicial intervention.

Consider how cooperation could hurt consumers and decrease economic efficiency. The usual method is an agreement among rivals to raise price (the cartel). If the parties to the agreement lack market power, though, they cannot reduce the industry's output—at least not by enough to be observable in litigation. Other firms will supply what consumers want at the competitive price, and there will be no injury. Other cooperative practices—boycotts, vertical integration and restricted dealing, and tie-ins—may raise rivals' costs of entry. For example, industry-wide vertical integration may require a prospective entrant to come in at two levels (say, manufacturing and distribution). This will take more time to arrange and increase the risk the entrant faces. But when there is no market power, many existing firms stand ready to sell on at least one of these levels. This makes simultaneous entry unnecessary. Vertical arrangements may lead to inferior outcomes if there are unusual demand conditions, but again this depends on the existence of a monopolized or tightly oligopolistic market. No power, no problem.

The market power inquiry logically precedes the question whether a restraint is "naked" and thus within the scope of the per se rule. The inquiry is so ordered in tying cases, and it should be in others as well. Not all cooperation is bad, and often it is hard to determine whether a restraint is "naked" for per se purposes. When the collaborators possess no market power, either their cooperation is beneficial, in which event it will flourish, or it is not, in which event it will die as rivals take the sales. When the collaborators have no power, monopoly cannot be their objective, and we must consider the more likely possibility that the arrangements create efficiencies.

When there is no market power, the market is better than the judicial process in discriminating the beneficial from the detrimental. Judges who try to assess the merits of the collaboration are apt to err, and the consequences of these errors will be one-sided. If judges condemn efficient practices, they will disappear, their benefits lost. If judges tolerate inefficient practices, the wrongly tolerated practices will disappear under the onslaught of competition. The costs of judicial error are borne by consumers, who lose the efficient practices and get nothing in return.

The history of antitrust is littered with practices condemned because of misunderstanding, when a simple market power inquiry would have revealed that they could not have caused injury. Sealy was a joint venture of about thirty firms that made mattresses. It adopted territorial allocations, rules on pricing, and other practices of the same sort any completely integrated firm applies to its plant managers. The mattress business was unconcentrated, and the restraints applied only to mattresses sold under the Sealy name. Most of the thirty firms made and sold non-Sealy brands in competition with Sealy products, and hundreds more rivals competed against these thirty. The restraints on Sealy-brand mattresses had the same sorts of benefits as any other form of organization. They promoted efficient production, distribution, and advertising, benefits of the sort now well-recognized. The Court held the territorial limits on sales unlawful per se because they were "horizontal." This exercise in formalism caused the Court to overlook the fact that, horizontal or not, the agreements could not have harmed competition and could well have helped it.

Similarly, the Court held unlawful an arrangement under which small grocers introduced and promoted their own "Topco" brand of goods. The grocers limited the territories in which the "Topco" brand (but not other brands) could be sold. The grocery business is fiercely competitive, and these firms had a small share. If they had merged, the transaction would have been almost too small to notice. Again the Court said "horizontal therefore bad"; again it condemned conduct that may have helped promote the product and thus increase competition in retail food as a whole yet could not possibly have harmed consumers. Even a cursory search for market power would have revealed that these practices had to be either beneficial or harmless.

2. Logical Relation Between Profit and Reduced Competition. The threat of antitrust liability is not the only reason businesses shy away from certain practices. Entrepreneurs fear business losses more than damages. The business losses occur sooner and with greater certainty. Markets impose their judgments automatically.

Antitrust law is useful in making cartels and monopolistic practices unprofitable. The premise of the damages remedy is that the threat of losses deters. Disgorgement of overcharges brings home to the offender the loss it imposes on others, and the trebling makes up for the likelihood that the offense will escape detection and punishment. The deterrent threat assumes that businesses attend to the risk of loss. If they do not, deterrence fails. If they do pay attention to losses, though, then it is safe to confine antitrust remedies to practices by which businesses obtain profits by harming competition. The market brings home to the offender any losses it imposes on others—and it brings them home more quickly than courts do.

The point is not that business losses perfectly penalize business mistakes but that they do so better than the next best alternative. *The* fundamental premise of antitrust is the ability of competitive markets to drive firms toward efficient operation. The entire corpus of antitrust doctrine is based on the belief that markets do better than judges or regulators in rewarding practices that create economic benefit and penalizing others. The common belief that if markets are imperfect then something else must be better is a logical fallacy. One need not pretend that markets work perfectly to see that they are better than judges at penalizing inappropriate conduct. Business executives do not respond flawlessly to a decline in profit, but judges do not respond to profit at all. The "business judgment rule" of corporate law is based on the sound conclusion that judges lack the information, experience, and incentives to make business decisions. Judges therefore decline to substitute their judgment for that of the managers. Judges are at the same comparative disadvantage in antitrust.

Some cases show how this filter would work in practice. Grinnell purchased mechanical snubbers for use in building nuclear reactors. It bought a two-years' supply from Pacific Scientific. Barry Wright Corporation, which had been Grinnell's supplier, brought suit, contending that the "exclusive" contract for a substantial portion of all snubbers reduced competition in the snubber market. If competition were reduced, though, suppliers of snubbers would charge higher prices in the future. Grinnell would be the poorer. It is a buyer of snubbers, not a producer. Why would Grinnell shoot itself in the foot? If contracts of this nature harm competition, the overcharges they create will induce the purchasers to abandon the arrangements; if the purchasers want them, that is excellent evidence that they are efficient.

Many vertical arrangements may be handled in the same manner. A manufacturer that adopts a system of resale price maintenance or closed territories allows the dealer to increase its margin. From the manufacturer's perspective, the difference between the wholesale and retail price is the "cost of distribution," which it wants to keep as small as possible. For any given wholesale price, the manufacturer wants the markup as small as possible in order to sell additional units. Unless the vertical arrangement creates or enforces a cartel (which is rare), the manufacturer protects the consumer's interests. It will not permit the margin to rise unless the dealer supplies a service that the customer values at more than the increase in price. Many tying arrangements also may be handled from this perspective. If the firm establishing the tie does not supply the "tied" good itself, it has no reason to injure competition.

Purportedly exclusionary or predatory practices furnish more examples. The logical story of any exclusionary practice is that a firm with market power adopts a strategy to increase its rivals' costs. This strategy is costly to the aggressor too, but it plans to recoup the costs by raising its prices after expelling the rival from the market or scaring the rival out of entering. The aggressor may reduce its price, and rivals must match the cut or lose sales; the aggressor may build a very large plant or introduce new products, making entry less attractive or diminishing the attraction of rivals' products to consumers; the aggressor may buy upstream or downstream suppliers, forcing rivals to search elsewhere for supplies; the list could be extended. These and other strategies are ambiguous. Low prices and large plants may be competitive and beneficial, or they may be exclusionary and harmful. We need a way to distinguish competition from exclusion without penalizing competition. *If* the practices are exclusionary, they will be profitable only if the aggressor can recoup. If the aggressor can not, there is no reason for antitrust concern. Either the business losses during the period of aggression will act as the penalty, or the conduct will turn out to be efficient.

The ongoing litigation about Japanese television sets offers a perfect illustration. The plaintiffs maintain that for the last fifteen years or more at least ten Japanese manufacturers have sold TV sets at less than cost in order to drive United States firms out of business. Such conduct cannot possibly produce profits by harming competition, however. If the Japanese firms drive some United States firms out of business, they could not recoup. Fifteen years of losses could be made up only by very high prices for the indefinite future. (The losses are like investments, which must be recovered with compound interest.) If the defendants should try to raise prices to such a level, they would attract new competition. There are no barriers to entry into electronics, as the proliferation of computer and audio firms shows. The competition would come from resurgent United States firms, from other foreign firms (Korea and many other nations make TV sets), and from the defendants themselves. In order to recoup, the Japanese firms would need to suppress competition among themselves. On plaintiffs' theory, the cartel would need to last at least thirty years, far longer than any in history, even when cartels were not illegal. None should be sanguine about the prospects of such a cartel, given each firm's incentive to shave price and expand its share of sales. The predation-recoupment story therefore does not make sense, and we are left with the more plausible inference that the Japanese firms did not sell below cost in the first place. They were just engaged in hard competition.

If courts had perfect information and wisdom, it might be appropriate to damn all inefficient practices. The threat of antitrust liability might speed up firms' recognition of their interests. If we are certain enough that some practice is harmful and must be snuffed out, no penalty is too high, no retribution too swift. But courts do not have perfect information, and the judicial process is both slow and costly. It is mistaken to suppose that because markets correct business errors only slowly, judges must be better. One must compare the costs and risks of the two processes.

The costs of the judicial process—including the costs of errors, which deter beneficial practices—suggest the wisdom of letting the competitive process rather than the courts deal with conduct that does not create profits by reducing competition. If the practice really is anticompetitive and privately unprofitable, it will go away in time. If it persists, the appropriate inference is that it has competitive benefits. We may not yet understand these benefits, but our understanding is not a condition of legality.

3. Widespread Adoption of Identical Practices. I come now to the filters that should be employed if a practice passes the first two filters *and* a careful inquiry reveals that it has potential competitive benefits. By the time the inquiry gets this far, naked restraints will have been condemned, and obviously-harmless practices will have been dismissed. The court will have for decision a variety of practices that may or may not be beneficial to consumers. It needs ways to separate the beneficial from the detrimental.

Most of the practices that get this far will be vertical arrangements—tying, restricted dealing, and the like. These are forms of partial integration. They are more confined than full integration and do not last as long, yet they reduce short-term rivalry. How should a court respond? One filter is especially useful for these practices. Unless all or almost all firms in an industry use the same vertical restraints, a case should be dismissed. The rationale for this filter is that every one of the potentially anticompetitive outcomes of vertical arrangements depends on the uniformity of the practice. For example, resale price maintenance (RPM) or territorial restraints can facilitate or enforce a cartel only if all firms in the industry use identical practices. If Sylvania uses RPM while GE and Sony do not, the RPM cannot facilitate anyone's cartel. Dealers that want to cheat on a dealers' cartel will sell more GE sets at reduced prices. And if practices are not identical in the manufacturing industry, the RPM cannot facilitate a cartel there, either. The whole point of a "facilitating practice" is that when everyone does things the same way, this reduces the number of things the cartel must monitor to control cheating. When everyone does *not* do things the same way, nothing can be "facilitated."

The argument that vertical practices may impede entry by requiring the new entrant to come in with several products (or at several levels) simultaneously also depends on uniform adherence to the restraint. If a monopoly manufacturer has long-term exclusive dealing contracts with its distributors, its distribution network is "foreclosed" to a would-be entrant. The prospective manufacturer must come in on two levels (making plus distributing) or arrange for coordinated entry. But if there are four manufacturers in the industry, and only one or two use exclusive distribution, the would-be entrant will find a group of distributors anxious to be its agents if it offers a better deal, which it will. (Recall the hypothesis: The lack of entry allows the existing firms to charge a price above the competitive level. The new entrant will find distributors queueing up if it charges a price closer to the competitive one. If the existing firms charge only the competitive price, there is no problem whether or not the new entrant can find distributors.)

The uniform-practice filter is exceptionally powerful. It screens out almost all challenges to vertical practices. In almost every market the manufacturers employ a staggering variety of selling methods. Some bundle products together and others do not; some use restricted dealing and others do not. It is hard to compile a list of ten cases in the history of antitrust that would proceed past this filter. Whatever explains a solitary manufacturer's use of RPM, exclusive contracts, ties, or other practices, the practice cannot be anticompetitive. Because other sellers use different methods, consumers have a choice. The competing offers of different products and different methods are competition at work.

4. *Effect on Output and Survival.* If arrangements are anticompetitive, the output and market share of those using them must fall. This is a simple application of the Law of Demand. If a firm raises the effective price of a product of given quality, it will sell less. Similarly, if a firm improves the quality of a product and charges the same price, it will sell more. If it both increases the price and increases the quality, it may sell more or less, depending on whether consumers value the improvement at more than

the cost. To take a trivial example, if Commodore puts a new and better keyboard on its Commodore 64 computer, it may raise its price a little to cover the extra cost. If its sales increase despite the higher price, we know that the change was worth the higher price, and then some, to consumers.

We can perform this test in many antitrust cases. Look at what happens when the manufacturer adopts the challenged practice. Hold other things, such as demand, constant. There are statistical tools for doing this, if the data are available. If the manufacturer's sales rise, the practice confers benefits exceeding its costs. If they fall, that suggests (although it does not prove) that there are no benefits.

Most vertical arrangements appear to have increased output. In *GTE Sylvania* the adoption of the territorial restraints coincided with an expansion of Sylvania's sales and market share. United States Steel's "tie" increased its sales of prefabricated houses and credit. The hospital in *Hyde* adopted its "tie" when it opened its doors; it grew like Topsy and continues to expand at the expense of other hospitals that use different staffing practices. In a number of restricted dealing cases that did not reach the Supreme Court, defendants put into evidence sophisticated economic studies of sales and share. So far as I am aware, in every vertical case in which modern econometric methods have been used, the economists found that the practices expanded output.

Sometimes the challenged practices were adopted so long ago that information about changes in output and share is no longer available. If so, we can approach the output question from a different perspective: did the practice survive? If a practice produces monopoly profits, the firms using it ultimately lose their positions to those offering consumers a better deal. We can determine whether this occurred.

Erosion may take a long time—and the firms will collect monopoly profits in the interim—but if the practice extracts an overcharge, erosion happens sooner or later. Even the best device for extracting an overcharge, merger to monopoly, does not last forever. General Motors, United States Steel, and other aggregations formed by merger are now but shadows of their former selves (in market share terms, anyway). Firms with impregnable monopolies protected by patents lose them quickly after the patents expire.

When the barriers to entry into the business are low, we would expect the erosion of position to occur reasonably quickly. The Antitrust Division's merger guidelines suggest that two years is "reasonably quickly" in antitrust; the Division inquires how much new output would be available within two years in response to a five percent increase in price. But for some practices two years is too short. Prospective entrants recognize that a new distribution practice may be abandoned by the firm that adopted it; firms do make mistakes. Rivals may wait before entering. And entry itself may take a while. Thus, for current purposes five years may be a better guide than two.

The proposed filter, then, is that if a firm or group of firms have employed some arrangement continuously for five years, and have not substantially lost market position, a challenge to the practice should be dismissed. Five years is arbitrary. The length of time should depend on how difficult it is to enter the business—considering entry barriers (costs borne by the new firms that were not borne by the existing ones), entry hurdles (costs that would not be recoverable if entry were abandoned, an important consideration in any strategic decision about entry), and the entry lag (how long entry takes even if there are low hurdles and no barriers). The lower the barriers, hurdles, and lags, the less time a court should require before it deems that new entry would have smothered any anticompetitive practice.

No matter how we define a "persistent" practice, the most reasonable inference is that a persistent practice is persistently beneficial to consumers. Long-term vertical arrangements cannot usefully be explained as cartel-facilitating practices. Cartels themselves rarely last five years. Although vertical arrangements may slow down entry, they do not interdict it. By the time five years has elapsed, most or all of the anticipated entry will have occurred. If the practice has survived for five years, it is probably beneficial; if it is not, its demise in the market probably will precede its demise at the hands of a court. Anticompetitive business practices customarily predecease the litigation they spawn.

5. *The Identity of the Plaintiff.* The antitrust laws are designed to prevent reductions in output and the associated higher prices. Yet higher prices are privately beneficial to the producers. Firms seek to enhance price when they can. One way to do so is to impose costs on rivals, for when rivals have higher costs the price in the market rises. (The price is set by the costs of the highest-cost producer able to stay in business.) Antitrust may be useful in raising rivals' costs. A judicial declaration that some efficient business practice is unlawful will raise costs of production, because the rival must shift to the next-most-expensive method. The imposition of costs may be more direct: treble damages are a cost of doing business, as are the costs of legal assistance, the costs of changing business plans to steer clear of antitrust exposure, and the diversion of the time and energy of executives from production to litigation. Antitrust counterclaims are a common reply to contract or patent litigation precisely because they greatly raise costs.

Antitrust litigation is attractive as a method of raising rivals' costs because of the asymmetrical structure of incentives. The plaintiff's costs of litigation will be smaller than the defendant's. The plaintiff need only file the complaint and serve demands for discovery. If the plaintiff wins, the defendant will bear these legal costs. The defendant, on the other hand, faces treble damages and injunction, as well as its own (and even its rival's) costs of litigation. The principal burden of discovery falls on the defendant. The defendant is apt to be larger, with more files to search, and to have control of more pertinent documents than the plaintiff.

Because of the asymmetries of the costs, antitrust may be a cheaper (and more effective) means of imposing costs on one's rivals than is resort to the political and administrative process. A firm seeking political relief from competition bears the bulk of the costs. It must overcome the difficulty of organizing a political coalition. The rivals get the benefit of inertia and instability; a political victory may be short-lived. In litigation, though, most costs and risks fall on the defendant, and the plaintiff's victory may last a long time. Regulation by antitrust cannot be undone through notice-and-comment rulemaking.

It is therefore important to find ways to reduce the attractiveness of antitrust as a method of raising rivals' costs, while at the same time preserving the power of antitrust to help consumers. One line worth drawing is between suits by rivals and suits by consumers. Business rivals have an interest in higher prices, while consumers seek lower prices. Business rivals seek to raise the costs of production, while consumers have the opposite interest. The books are full of suits by rivals for the purpose, or with the effect, of reducing competition and increasing price. The Department of Justice, recognizing that public suits also may restrain competition, is reviewing existing antitrust decrees. Courts cannot review old decrees on their own motion, but they should be careful not to create new restraints. They therefore should treat suits by horizontal competitors with the utmost suspicion. They should dismiss outright some categories of litigation between rivals and subject all such suits to additional scrutiny.

One category of complaints that should not be entertained at all concerns lower prices. Here the suit seeks protection from competition, and dismissal should be automatic. The *Brunswick* doctrine implements this proposal for some cases. The plaintiff in *Brunswick* was a bowling center attacking Brunswick's acquisition of other bowling centers. It complained that the acquisition kept in the market bowling emporiums that otherwise would have failed, thus diverting business from its lanes to Brunswick's and producing lower prices. The lower courts held the acquisitions unlawful (because Brunswick ended up with a large market share) and awarded plaintiff treble its lost profits. The Supreme Court dispatched the suit quickly, pointing out that the antitrust objection to mergers is higher prices, not lower ones, and that plaintiff's injury therefore was not compensable. All business practices cause dislocations and losses—the most successful practices cause the deepest losses—but antitrust does not offer insurance against competitive injury.

Brunswick's "antitrust injury doctrine" has been extended beyond mergers. It is usually put as a restriction on remedies, though, and this diverts attention from the real problem. *Brunswick* responds to the fact that often the lure of damages (or the ability to raise rivals' costs) induces plaintiffs to challenge conduct that is procompetitive. The suits impose costs whether plaintiffs win or not; worse, given the unavoidable number of erroneous decisions in antitrust cases, the suits bring condemnation on useful conduct. The best way to deal with this is to generalize the *Brunswick* approach.

The suit by Chrysler against the General Motors (GM)-Toyota joint venture is a prime example. GM and Toyota agreed to make sub-compact cars at a plant in California. The FTC investigated the proposal for almost a year, concerned that the joint venture was a mask for broader cooperation and would assist GM and Toyota in reducing their joint output. If the jointly-produced car should replace independent projects by each firm or induce Toyota to import fewer cars, it could have such an effect. The FTC, GM, and Toyota finally agreed on a consent judgment limiting the extent of the cooperation. Chrysler promptly filed suit against the joint venture.

The identity of the plaintiff is all the court needs to know. There are two hypotheses about the GM-Toyota agreement: one is that the two firms are conniving to reduce output and drive up prices, and the other is that they have found a way to combine their skills to make a new car at lower costs than either could alone. (A third is that the venture evades import restrictions. This has the same implications as the second hypothesis.) If the first hypothesis is true, then Chrysler will be a winner. It will reap the higher prices without having to reduce its own output. If the second hypothesis is true, then Chrysler will be injured by the ensuing price reduction and erosion of sales. Chrysler's suit demonstrates that it views the second hypothesis as the correct one. Because only the first hypothesis supports an antitrust objection, the suit contains the formula of its own dismissal. Any other suit by a business rival against a merger or joint venture should be dismissed for the same reason.

Almost the same analysis applies to predatory practices suits brought by firms that have not left the market. Some of these suits explicitly request the court to order a business rival to raise price, and they may be dismissed quickly. The standard tale of predatory pricing (which is identical for these purposes to any other exclusionary practice) is that the aggressor inflicts fatal wounds on the rival in period one in order to drive it out of business, and thus collect monopoly profits in period two. If the rival does not depart, however, it will collect the same price in period two as the aggressor. If there never are monopoly prices, the case fails the second filter because the aggressor receives no profit from its conduct. Often, though, it is hard to tell whether the aggressor's conduct raised price. If the effect on price is uncertain, the suit by the surviving rival still should be dismissed. The plaintiff collects the same prices in today's market as the defendant. If the course of conduct creates a monopoly profit for the aggressor, it creates one for the plaintiff too. The plaintiff has little reason to challenge a business practice with this effect. Plaintiff's ideal world is to collect monopoly profits today and also obtain reimbursement for losses sustained in the period of aggression. But if the plaintiff expects to stay in business, this is not an obtainable end. The award of damages will make similar episodes—which, by hypothesis, yield net benefits to plaintiff and defendant—unprofitable for the defendant. The plaintiff does not want to kill the goose that laid the golden egg. Thus a court should infer from the challenge that the net effect of the defendant's conduct has been to reduce rather than increase price.

Many other plaintiffs also have the wrong incentives. Antitrust suits by the targets of tender offers often are designed to protect the managers' jobs or to increase the price paid for the target, rather than to protect consumers from higher prices. Targets may bring such litigation even though the sole effect of the acquisition would be to increase the joint firms' efficiency. Targets therefore are inappropriate plaintiffs.

IV. Conclusion

Antitrust is an imperfect tool for the regulation of competition. Imperfect because we rarely know the right amount of competition there should be, because neither judges nor juries are particularly good at handling complex economic arguments, and because many plaintiffs are interested in restraining rather than promoting competition.

The per se rule is not a satisfactory response to these problems. Condemnation per se rests on a conclusion that all or almost all examples of some category of practices are inefficient, yet we cannot reach such a judgment for any practice other than naked horizontal restraints. The traditional Rule of Reason falls prey to all of the limits of antitrust. It assumes that judges can tap a fount of economic knowledge that does not exist, and it disregards the costs of judicial decision-making (including the costs of damning efficient conduct by mistake or design). Something must be done.

That "something" is to replace the existing method of antitrust analysis with a series of simple filters. Each filter should be designed to screen out beneficent conduct and pass only practices that are likely to reduce output and increase price. The filter approach shares with the per se approach the judgment that such screening should be done by category of case rather than one case at a time. The courts should establish rules, recognizing that one cost of decision by rule is occasional over- and under-breadth.

The filters deal with the ingredients of anticompetitive practices. If there is no market power, if the defendant cannot profit by reducing output, or if the conduct fails any of the other tests, there is no substantial competitive problem. Each filter errs, if at all, on the side of permitting questionable practices. Yet precision is unobtainable, and the bias in favor of business practices is appropriate. The price of case-by-case inquiry into the actual competitive consequences of business practices is large. The price includes prohibiting some efficient practices and deterring others. What we get in exchange today is not worth this price.

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